Office-Supreme Court, U.S.
FILED
JUN 10 1983
ALEXANDER L. STEVAS,
CLERK

82-2017
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOSEPH N. MARTIN, Petitioner

v.

J.P. MITCHELL, WARDEN, and
J. MARSHALL COLEMAN, ATTY. GEN.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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June 7, 1983

QUESTIONS PRESENTED

Whether it is a per se constitutional violation for a jury to ask spontaneous, uncensored questions during a criminal trial, at the invitation of the prosecutor, and without any predetermined plan for testing the propriety of those questions in a manner which safeguards the defendant's sixth and fourteenth amendment right to a fair trial by an impartial jury?

Whether a trial court's failure to conduct a minimal jury inquiry concerning the potential impact of a rhetorical political campaign brochure mailed to the jurors and discussing the very trial on which they were then sitting is a per se violation of the right to a fair trial by an impartial jury?

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IN THE

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October Term, 1982

No. _____

Joseph N. Martin, Petitioner

v.

J.P. Mitchell, Warden, and
J. Marshall Coleman, Atty. Gen.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Joseph N. Martin, seeks a writ of certiorari through this petition to present this Honorable Court with the opportunity of clarifying the constitutional due process right not to be deprived of

liberty without a fair trial by an impartial jury. Petitioner respectfully requests that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit, entered on April 11, 1983, affirming the District Court's Order of December 9, 1981.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit rendered a final judgment on April 11, 1983, Appendix at 1a, affirming the Order and opinion of the United States District Court for the Eastern District of Virginia denying Mr. Martin's Petition for a Writ of Habeas Corpus. Appendix at 4a, 5a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit, affirming the denial of Mr. Martin's petition for a

writ of habeas corpus, was entered on April 11, 1983. This Petition for a Writ of Certiorari is filed within sixty days of that date, as required by this Court's Rule 20.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The sixth amendment provides, in part, that "(i)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .."

The fourteenth amendment, section one, states: " . . . (N)or shall any State deprive any person of life, liberty, or property, without due process of law . . .."

STATEMENT OF FACTS

Petitioner Joseph N. Martin was arraigned in the Circuit Court for Arlington

County, Virginia, on April 19, 1979, in connection with the murders of Alan W. Foreman and Donna M. Shoemaker, which occurred on May 7, 1977.

In the summer of 1977, Petitioner and Richard Lee Earman were indicted for these murders. Charges were dismissed against Petitioner, and Earman was acquitted in the fall of 1977. One year later, Earman confessed to the killings, and was allowed to plead guilty to conspiracy to murder in return for his confession and his testimony that Petitioner had hired him to commit these crimes. In addition, some two hundred burglary charges against Earman were dropped and he was subsequently sentenced to ten years in prison. Earman also arranged with Kaya Ploss, who became a government witness in this case, for Ploss to write a book on Earman's life of crime. The monetary success of both Earman and the book

hinged upon Earman's actually having committed the killings for which he was acquitted.

Prior to Petitioner's trial in the fall of 1979, the trial court raised, sua sponte, the propriety of the Arlington County (Va.) Commonwealth Attorney's office prosecuting this case because of the possibility of the Commonwealth Attorney himself being called as a witness. After a series of ex parte contacts between the prosecutor and the trial court, the court appointed a special prosecutor.

The publicity surrounding Mr. Martin's case included formally charged and uncharged criminal activity, including conspiracy with the Commonwealth's Attorney involving the manner in which the investigation of the case was handled, as well as certain prosecutorial decisions concerning the case, and political intrigue concerning the

Arlington County Commonwealth Attorney and the Virginia State Attorney General. This publicity escalated into a central issue in the political campaign for the office of the Arlington County Commonwealth Attorney in 1979. This campaign was conducted prior to and during Mr. Martin's trial. Between the time the jury was selected and sworn and the time it began taking evidence, an extraordinary political campaign brochure, Appendix at 20a, on behalf of one of the two candidates for the office of the Commonwealth's Attorney for Arlington County was sent, by mail, to the home of every registered voter in the County, including the judge and the jurors in Petitioner's trial. This candidate was introduced to the jury as a probable witness for the prosecution. In addition to urging the support of prospective voters on election day, the brochure contains a lengthy and

biased account of the Commonwealth Attorney's handling of Richard Lee Earman's earlier trial which had resulted in an acquittal, as well as his later dealings with Earman. The brochure referred to the ongoing publicity concerning the Commonwealth Attorney's attempts to investigate the Virginia Attorney General (the most recent of which occurred within one week of the trial), the role of the State Police in seeking to reopen the investigation of the double homicide between the time Earman was acquitted and the time Mr. Martin was brought to trial, as well as the Virginia Attorney General's probe into the Commonwealth Attorney's handling of this murder case. This information was inadmissible and was, in fact, not brought to the attention of the jury by competent evidence during the trial. Nevertheless, despite this potential prejudicial tainting

of the jury, the trial court refused, after a timely defense request, to make even a minimal threshold inquiry concerning this rhetorical campaign brochure. The court merely instructed the jurors (who were unsequestered) not to read this brochure. That instruction, however, came after the brochure had been received by the jurors.

Against this backdrop, Petitioner was further prejudiced when, in his opening statement to the jury the prosecutor, over defense objection, but with the approval of the court, invited members of the jury to ask spontaneous, uncensored questions in open court throughout the trial on any matters jurors did not precisely understand. During the seven week trial (which included over ninety-five witnesses and 225 exhibits) the jurors directed at least thirty-eight questions to the court, the prosecutor, or to witnesses themselves.

The trial, which had commenced October 26, 1979, ended on December 13, 1979, with Mr. Martin's conviction of the murder for hire of Alan Foreman and the second degree murder of Donna Shoemaker, in violation of Va. Code §§ 18.2-31(b), 18.2-32 (1950 as amended). On January 18, 1980, the trial court imposed the jury-recommended sentences of life plus twenty years, to run consecutively. Final judgment in these matters was entered February 4, 1980.

A petition for appeal was filed with the Supreme Court of Virginia on May 30, 1980. That petition was denied on December 10, 1980.

Thereafter, Mr. Martin filed a petition for a writ of habeas corpus with the United States District Court for the Eastern District of Virginia, which was denied in an Order and Memorandum Opinion, on December 9, 1981. Appendix at 4a, 5a.

The District Court's denial was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court on April 11, 1983. Appendix at 1a.

This petition for certiorari followed from the decision of the Fourth Circuit.

REASONS FOR GRANTING CERTIORARI

This Court has ruled that an accused has a due process right to a trial by an impartial jury free from outside influences. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). The case before the Court presents two issues of first impression involving the sixth and fourteenth amendments:

(1) Is it a per se constitutional violation for a jury to ask spontaneous, uncensored questions during a criminal trial, at the invitation of the prosecutor,

and without any predetermined plan for testing the propriety of those questions in a manner which safeguards the defendant's right to a fair trial by an impartial jury;

(2) Is a trial court's failure to conduct a minimal jury inquiry concerning the potential impact of a rhetorical political campaign brochure mailed to the jurors and discussing the very trial on which they were then sitting a per se violation of the right to a fair trial by an impartial jury.

I. DURING A CRIMINAL TRIAL, JURORS SHOULD NOT QUESTION WITNESSES, COUNSEL OR THE COURT ABSENT A PROCEDURE WHICH INSURES FAIRNESS

It is the jury's function to determine facts, having listened to evidence elicited by counsel for both sides. Pacific Improvement Co. v. Weidenfeld, 277 F. 224 (2d Cir. 1921). In criminal cases, jurors

should only ask questions within a procedure designed to safeguard a defendant's due process right to a fair trial by an impartial jury. See United States v. Callahan, 588 F.2d 1078 (5th Cir.), rehearing denied, 591 F.2d 1343, cert. denied Callahan v. United States, 444 U.S. 826 (1979). The states also have recognized that participating in trials through active questioning is not a jury function. See, e.g., Cheeks v. State, 361 N.E.2d 906 (Ind. 1977); Cherry v. State, 258 Ind. 298, 280 N.E.2d 818 (1972); People v. Knapper, 230 App. Div. 487, 245 N.Y.S. 245 (1930). The Indiana cases recognize the trial court's obligation to fashion a procedure for determining the propriety of questions before they are voiced and of doing so in such a manner as will avoid pitting the defense against the jury. Georgia has gone so far as to state that jurors should never

be permitted to ask questions because it is an untenable position for attorneys to have to object to juror questions. Stinson v. State, 151 Ga.App. 533, 260 S.E.2d 407 (1979).

Petitioner suggests that the lack of any such procedure in his case rendered his trial fundamentally unfair. Having been invited by the prosecutor to ask questions during the trial, the jurors did so, forcing defense counsel to object both to the propriety and to the substance of their questions, developing a special rapport with the prosecutor and helping him carry his burden of proof through a most difficult part of his case: the detailed insurance scam alleged as the motive for murder. In reviewing this issue, the Fourth Circuit adopted the position of the Eastern District of Virginia that "these questions, while irrelevant, were, for the most part,

innocuous." Appendix at 15a. Petitioner does not contend that his trial was unfair because some questions were virulent rather than innocuous. Rather, he suggests that if a jury in a criminal case is allowed to ask questions of witnesses, counsel and the court, it should neither be as a response to a prosecutor's invitation nor done spontaneously, uncensored and in open court. An absolute rule must be fashioned necessitating a procedure which safeguards his right to a fair trial by an impartial jury. While the particular procedure may be left to the discretion of the trial court, the necessity of a procedure must be mandated. To do anything less is to compromise the defendant's right to a fair adversarial trial by an impartial jury.

II. THE TRIAL COURT'S FAILURE TO QUESTION THE JURORS CONCERNING A POLITICAL BROCHURE WHICH WAS

MAILED TO THEM DURING TRIAL AND WHICH DISCUSSED THAT TRIAL DENIED PETITIONER'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY

A trial court's total failure to ascertain whether a jury is influenced by material not presented at trial is a blatant disregard for a defendant's right, under Sheppard v. Maxwell, 384 U.S. 333, 362 (1966), to a fair and impartial trial, free from outside influence. See Duncan v. Louisiana, 391 U.S. 145 (1968)(applying the sixth amendment jury trial right to the states). In Petitioner's case, the trial court determined without inquiry that the political brochure sent to the jurors was not sufficiently prejudicial as to warrant an examination of the jurors. Appendix at 19a. However, this Court may review that finding as clearly erroneous. Sumner v. Mata, 449 U.S. 539 (1981). Political brochures are by nature rhetorical and

designed to manipulate the reader in a predetermined fashion. This brochure was designed to incite the potential voter against the incumbent Commonwealth Attorney, who was a witness connected by intrigue with Richard Lee Earman, the government's main witness. The association of Petitioner with these two people in the same political mailing should have been at least the subject of inquiry by the trial court. When this politically motivated mailing cast its shadow of prejudice across Petitioner's trial, the trial court should have determined with some degree of certainty whether any of the jurors were sitting within its darkness.

The Fourth Circuit (following the Seventh Circuit) has ruled that such an inquiry should be made when there is a danger of publicity influencing a jury. United States v. Taylor, 569 F.2d 448 (7th

Cir.), cert. denied, 435 U.S. 952 (1978); United States v. Jones, 542 F.2d 186 (4th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Hankish, 502 F.2d 71 (4th Cir. 1974). See Brittle v. Commonwealth, 222 Va. 518, 522, 281 S.E.2d 889, 890 (1981)(possibility of prejudice from outside influence warrants reversal).

Petitioner contends that he was denied a fair trial by an impartial jury because the trial court, despite a timely defense motion, would not even inquire whether the jurors had been influenced by an inflammatory campaign brochure which directly addressed Petitioner's culpability for the charges pending against him. It also raised the spectre of criminal activity with which he was not charged. This is especially egregious given the ease with which an inquiry could have been made.

CONCLUSION

The Fourth Circuit affirmed the District Court's denial of Mr. Martin's petition for a writ of habeas corpus, which he predicated on errors committed by the trial court. A writ of certiorari should issue to the United States Court of Appeals for the Fourth Circuit so that this Court may clarify the constitutional right not to be deprived of liberty without a fair trial by an impartial jury.

Respectfully submitted,

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June 7, 1983

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-6579

Joseph N. Martin,

Appellant,

v.

J. P. Mitchell, Warden;
J. Marshall Coleman,
Atty. Gen.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, At Alexandria. Albert V. Bryan, Jr., Circuit Judge.

Argued: February 10, 1983 Decided April 11, 1983

Before RUSSELL, MURNAGHAN and CHAPMAN, Circuit Judges

Stephen J. Cribari (Cate & Goodbread, P.C.; Dolan, Treanor, Murray & Walsh, P.C., Gerard F. Treanor, Jr. on brief) for Appellant; Thomas D. Bagwell, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia on brief) for Appellee.

PER CURIAM

The appellant was convicted in the Circuit Court of Arlington County, Virginia of murder for hire in connection with the May 7, 1977 homnicides of Allen W. foreman and Donna M. Shoemaker. Martin's appeal to the Virginia Supreme Court was denied and he filed a writ of habeas corpus in the United States District Court for the Eastern District of Vriginia. He now appeals from that court's denial of the writ.

Appellant raises four issues: (1) the trial judge erred in failing to order a

mistrial or to examine the jurors with respect to a political brochure that was mailed to all registered voters in Arlington County during the trial of the case which consumed seven weeks; (2) that he was denied a fair trial because jurors were allowed to ask questions in open court; (3) that he was denied his right to confrontation of certain witnesses because of the admission of hearsay testimony; and (4) that he was denied compulsory process by the trial judge's refusal to enforce a subpoena duces tecum.

Each of these issues has been completely discussed and correctly decided by the December 9, 1981 order of the district judge (Civil Action No. 81-0934-AM, Eastern District of Virginia, Alexandria Division) and we affirm for the reasons set forth by the district court.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JOSEPH N. MARTIN,	)	
	)	
Petitioner,	)	
	)	
V.	)	C.A. No. 81-0934-AM
	)	
J.P. MITCHELL, WARDEN, et al.,	)	
	)	
Respondents.	)	

O R D E R

For the reasons set forth in the Memorandum Opinion this day filed, it is

ORDERED that the petition for a writ of habeas corpus is denied.

/s/ United States District Judge

Alexandria, Vriginia
December 9th, 1981

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JOSEPH N. MARTIN, Petitioner,	)	
V.	)	C.A. No. 81-0934-AM
J.P. MITCHELL, WARDEN, et al., Respondents.	)	

MEMORANDUM OPINION

Petitioner, a Virginia state prisoner, attacks, pursuant to 28 U.S.C. § 2254, his conviction in the Circuit Court of Arlington County on charges of murder for hire and second degree murder. He asserts the following constitutional violations:

(1) That the court erred in failing to order a mistrial or examine the jurors with respect to a political mailing sent to all registered voters;

(2) That the posing of random and uncensored questions by the jurors denied petitioner a fair trial;

(3) That the admission of certain hearsay testimony into evidence denied petitioner his right to confront witnesses; and

(4) That the court's failure to enforce its subpoena duces tecum denied petitioner his right to compulsory process.

Petitioner has exhausted his state court remedies, his petition for a writ of error to the Supreme Court of Virginia having been denied on December 10, 1980.

This matter is before the court on the respondents' motion to dismiss and on petitioner's reply, along with memoranda of law and a transcript of the proceedings at petitioner's trial in state court. There appearing to be no material facts in

dispute, the court will treat respondents' motion to dismiss as a motion for summary judgment and resolve the questions of law presented.

Petitioner's first challenge stems from a campaign brochure mailed while his trial was underway by a a (sic) candidate for Commonwealth's Attorney to all registered voters, and containing a section entitled "The Foreman-Shoemaker Murder Case: A Question of Competence." This section of the brochure was a critical account of the handling of the trial of petitioner's alleged co-conspirator, Richard Lee Earman, who became the chief prosecution witness at petitioner's trial. The account included several lines which, according to petitioner, the jury would have understood to refer to him. These lines read:

> Burroughs [the Commonwealth's Attorney], in the face of clear and convincing evidence, refused to proceed further

> with the prosecution. In fact, with respect to one of the alleged participants, Burroughs declined to even subpoena vital records needed by the police. Furthermore, Burroughs issued orders to the police not to arrest this alleged participant. Considerable suspicion was aroused by the manner in which Burroughs was handling this matter. This controversy resulted in a criminal investigation by the Virginia State Police of the Earman case and Burroughs' association with one of the alleged participants.

Petitioner argues that "one of the alleged participants" refers to him, and that the reference is obvious because only two principals were charged in the killings: Earman and himself. He argues that the controversy surrounding Burroughs' handling of the case would have been inadmissible and that this account of it was highly prejudicial, implying an improper association between the prosecutor and himself.

Defense counsel promptly moved for a mistrial or for a voir dire regarding the

campaign brochure. The judge responded that he had received the brochure himself and read it that morning. He noted that while it dealt with these cases at least tangentially, nowhere did petitioner's name, or this case or the circumstances of this trial appear. He could "see nothing in it even remotely prejudicial affecting this matter one way or another." November 2, 1979 Trial Transcript at 5. It is noteworthy that the judge had instructed the jury at the outset and reminded the jury frequently throughout the trial not to read anything about the case or to discuss the case and to retrict (sic) their information about the case entirely to what they heard in the courtroom. October 25, 1979 Trial Transcript at 128-29.

The Fourth Circuit, in United States v. Hankish, 502 F.2d 71 (4th Cir. 1974), enunciated the rule that "when highly

prejudicial information may have been exposed to the jury, the court must ascertain the extent and effect of the infection, and thereafter, in its sound discretion, take appropriate measures to assure a fair trial." Id. at 77. This procedure requires a finding that "there is substantial reason to fear prejudice" before the need to question the jurors arises. In petitioner's case, the judge found no likelihood of prejudice, and it is this finding that is under review.

While no fact situation appears to exactly parallel this one, a survey of the relevant cases compels the conclusion that the finding of insufficient prejudice to require an examination of the jury was not erroneous. Sumner v. Mata, 449 U.S. 539 (1981). In Hankish, for example, the offending article described the defendant as a racketeer who had directed a multistate

theft ring and who had lost his legs when his car was blown up in gangland fashion. 502 F.2d at 76. In United States v. Pomponio, 517 F.2d 460 (4th Cir. 1975), the article mentioned that the defendants were being tried for only the first 10 out of 113 pending counts. The Fourth Circuit characterized the articles in both of those cases as highly prejudicial. By contrast, two cases in which the Fourth Circuit found the articles not to impose a substantial likelihood of prejudice appear to more closely parallel the instant case. The article at issue in United States v. Jones, 542 F.2d 186 (4th Cir. 1976), dealt with the murder of a city alderman purported to have been involved in drug traffic. Mentioned in the article were two names that had also been referred to at petitioner's trial on drug conspiracy charges. The court found no error in the trial judge's failure to

interrogate the jurors in regard to this article. Id. at 197. In United States v. Grande, 620 F.2d 1026 (4th Cir. 1980), the article contained a statement to the effect that Grande had accepted extortion money. Again, the Fourth Circuit found no error in the trial judge's refusal to interrogate the jurors regarding this article.

In this case, the oblique reference in the campaign mailing to "an alleged participant" certainly was no more damaging than the references in the Jones or Grande articles. The disputed lines were toward the end of an article that focused almost exclusively on the Commonwealth's Attorney. They required an inference that petitioner was the alleged participant, and that he had been involved in a cover-up before prejudice would result. On these facts, while it may have been advisable to voir dire the jury, the judge's failure to do so

was not plain error. See also United States v. Ricardo, 619 F.2d 1124 (5th Cir. 1980)(newspaper articles contained an account of defendant's former trial on the same charges; refusal to voir dire held not to be an abuse of discretion); United States v. Taylor (sic) (article stated that defendant was armed at the time of arrest; refusal to voir dire held not to be plain error).

Petitioner's second claim is that the trial procedure allowing jurors to pose random questions in open court rendered his trial fundamentally unfair. In his opening statement, the prosecutor invited the jurors to ask questions if they were confused during trial. Over petitioner's objection, the judge permitted jurors to ask questions simply by raising their hands and being recognized. Over the course of the trial, jurors directed questions to either

witnesses, the court of the prosecutor on thirty-eight different occasions, with some of these occasions involving multiple questions. Petitioner contends that this procedure forced him into a position of objecting to juror questions, thus risking alienation of the jury. In addition, he constantly was exposed to the possibility of detrimental hearsay emerging. Finally, the prosecutor's invitation to the jury enabled him to develop a special rapport with them, and at the same time assess whether they grasped his theory of the case.

While uncensored juror questions may present a serious risk of eliciting prejudicial hearsay and disrupt the proper functioning of the trial, an examination of the trial proceedings in this case does not reveal that petitioner was so prejudiced as to have been denied a fair trial. The trial ran from October 26, 1979 through December

13, 1979. Although jurors posed questions thirty-eight times, only eight of these questions or series of questions were directed to witnesses. Petition for Writ of Habeas Corpus at 20 n. 14. A review of the transcript reveals that these questions, while irrelevant, were, for the most part, innocuous. In no instance did either the question or the answer seriously prejudice petitioner. Nor can this court find that the procedure so promoted rapport between the prosecutor and the jury that petitioner was denied an impartial trial.

Petitioner's third claim concerns a violation of his Sixth Amendment right to confrontation due to the admission of damaging hearsay. He challenges the admission of statements made by Earman to Kaya Ploss and the playing of a tape of Earman's confession. The Commonwealth argues that these statements were properly

admitted as prior consistent statements to rebut the motive to falsify developed on cross-examination of Earman. Petitioner replies that by playing the tape during Burroughs' testimony, weeks after Earman had testified, and eliciting the statements during Ploss' testimony, the Commonwealth deprived him of his right to cross-examine Earman on these statements. The court finds in this scenario no violation of petitioner's right to confront the witnesses against him. Petitioner conducted an extensive cross-examination of Earman when he was on the stand, and at that time had the prior statements available to him.

Petitioner's final claim is that the court's refusal to enforce its subpoena duces tecum denied him his right to compulsory process. The trial court initially issued a subpoena duces tecum to Kaya Ploss to compel her presence as an

out-of-state witness as well as to compel her to bring certain written records, including her manuscript of a book about Earman's life. Ploss, instead, turned these records over to the Commonwealth's Attorney, who then gave copies of all the records except the manuscript to petitioner. The court refused to order that the manuscript be turned over, finding that it was a secondary source and that the same information was available through the rest of the records. Although the court did refuse to enforce its subpoena duces tecum as written, this refusal did not deprive petitioner of his right "to have compulsdory process for obtaining witnesses in his favor." U. S. CONST. amend. VI. Ploss appeared as a witness and petitioner was allowed access to her records to the extent the trial judge found reasonable after a hearing on the matter. See United States v.

Nixon, 418 F.2d 683, 698 (subpoena may be quashed where production would be unreasonable or oppressive).

For these reasons summary judgment will be granted in favor of the respondents and the petition for a writ of habeas corpus denied.

/s/ United States District Judge

Alexandria Virginia
December 9th, 1981

[From Transcript of November 2, 1979 at 5]:

THE COURT: As one of the households in Arlington County involved, I received that literature. Read it only this morning. It dealt with these cases at least tangentially. I noticed Mr. Martin wasn't named in it. Nowhere does his name appear. Nowhere does this case appear. Nowhere do the circumstances of this trial appear. I can see nothing in it even remotely prejudicial affecting this matter one way or another. it does indeed talk about Mr. Earman in considerable length, but it doesn't mention Mr. Martin or any supposed connection of Mr. Martin with these events. The motion is denied.

[Reproduced below is an exerpt from the "Hudson for Commonwealth's Attorney" campaign brochure. All of the text concerning this case is provided. The brochure itself contains, in addition to the text, a montage of newspaper headlines concerning Petitioner's case as well as photographs of Henry Hudson, J. Marshall Coleman, and Sen. John W. Warner. The remaining four pages of the brochure conveyed information relevant to Mr. Hudson's professional qualifications.]

THE FOREMAN-SHOEMAKER MURDER CASE:

A QUESTION OF COMPETENCE

In May of 1977, the bodies of Alan Foreman and Donna Shoemaker were discovered in the garage of Foreman's Arlington County residence. Each had been murdered by repeated close-range gunfire.

The investigation by the Arlington County police which followed revealed that Richard Lee Earman, a paroled burglar, had been hired to commit the murder. Earman was indicted and his case set for trial on July 25, 1977. On that date, the current Commonwealth's Attorney, William S. Borroughs, Jr., was forced to drop charges against Earman because he had failed to prepare the case for trial. In fact, only a handful of the fifty witnesses had been interviewed by Mr. Burroughs.

Earman was later reindicted. In September of 1977 Earman was found not guilty after a lengthy and controversial trial. The trial was marked by several significant errors:

1) Burroughs immediately began to attempt to plea bargain with Earman. Earman was offered an opportunity to plead guilty to a single charge and receive a

sentence which would make him eligible for release in ten (10) years. Burroughs also agreed to ask the State to excuse Earman's violation of parole. This gave Earman an upper hand from the beginning.

2) Burroughs utilized valuable trial preparation time to conduct "off the record" conferences with Earman and investigate "leads" which any experienced prosecutor would know were irrelevant and frivolous. Meanwhile, defense attorneys used this time to diligently prepare the case for trial.

3) Burroughs was not adequately prepared for the trial. Several key witnesses had not been thoroughly interviewed in advance.

4) Burroughs supplied defense attorneys with every detail of his case. This is not the common practice in Virginia.

5) Burroughs changed his theory of the case in mid-trial and confused the jury. It is not required that the prosecutor prove the motive of a homicide, but only the fact that it occurred and the identity of the killer (Earman). Rarely will a prosecutor know exactly what happened in a case. Burroughs should have kept the jury's attention focused on the crime and the murderer, rather than the reason for the killing.

6) Burroughs failed to even attempt to use Earman's confession against him. This confession was properly taken by the Arlington County police and its use at trial would have insured Earman's conviction.

For the two-year period following the Earman trial, Burroughs quarrelled with the Police Department over the handling of the homicide investigation. Burroughs attempted

to blame the Police Department for his own mishandling of the case. Meanwhile, the police continued their investigation and recommended additional indictments. Burroughs repeatedly refused this request and demanded further investigations. Despite the fact that the police were satisfied that their investigation was complete, they pursued additional leads. This continuing investigation merely served to confirm what the police had told Burroughs initially. Burroughs, in the face of clear and convincing evidence, refused to proceed further with the prosecution. In fact, with respect to one of the alleged participants, Burroughs declined to even subpoena vital records needed by the police. Furthermore, Burroughs issued orders to the police not to arrest this alleged participant. Considerable suspicion was aroused by the manner in which Burroughs was

handling this matter. This controversy resulted in a criminal invesitgation by the Virgini (sic) State Police of the Earman case and Burroughs' association with one of the alleged participants.

In the Spring of 1979, after increased pressure by the Arlington County Police Department, Richard Lee Earman was indicted for conspiracy to commit murder. Earman eventually entered a plea of guilty and again admitted being the hired killer of Foreman and Shoemaker. Soon thereafter Burroughs offered no objection to Earman taking a vacation in the Bahamas before reporting to jail. Earman now faces a maximum of only ten years for one of the most heinous murders in Arlington County history. Additionally, Burroughs has agreed to further assist Earman by recommending that his sentence be served at a Federal (not Virginia State) penitentiary of Earman's choice.

Office-Supreme Court, U.S.
FILED
SEP 26 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2017

In The

Supreme Court of the United States

October Term, 1982

JOSEPH N. MARTIN,

Petitioner,

v.

J. P. MITCHELL, WARDEN, and
J. MARSHALL COLEMAN, ATTORNEY GENERAL,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether it is a *per se* constitutional violation for a jury to ask spontaneous, non-prejudicial, uncensored questions during a criminal trial, at the invitation of the prosecutor, and without any predetermined plan for testing the propriety of those questions in a manner which safeguards the defendant's Sixth and Fourteenth Amendment right to a fair trial by an impartial jury.

2. Whether a trial court's failure to conduct a minimal jury inquiry concerning the potential impact of a rhetorical, non-prejudicial campaign brochure mailed to the jurors and discussing the very trial on which they were sitting is a *per se* violation of the right to fair trial by an impartial jury.

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v.

J. P. MITCHELL, WARDEN, and
J. MARSHALL COLEMAN, ATTORNEY GENERAL,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

The Respondents respectfully pray that a writ of certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on April 11, 1983 not be granted.

OPINION BELOW

The judgment of the United States Court of Appeals for the Fourth Circuit is an unpublished opinion reported as *Joseph N. Martin* v. *J. P. Mitchell, Warden; J. Marshall Coleman, Attorney General* (Record No. 82-6579) (4th

Cir. April 11, 1983)) found in the Petition for Certiorari at App. 1A. This final judgment affirmed the Order and Opinion of the United States District Court for the Eastern District of Virginia, denying the Petitioner's petition for a writ of habeas corpus. This opinion can be found at page 5A. of the Appendix to the petition for a Writ of Certiorari.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE[1]

The evidence at Martin's trial revealed that he was an insurance agent for New York Life Insurance Company and was about to be promoted to assistant manager. In order for Martin to receive as high a salary as possible as assistant manager, he devised a scheme to boost his sales of bogus insurance policies to inflate his base salary when he became assistant manager. His base salary as assistant manager was dependent upon his earnings as a salesman. To fund Martin's scheme he attempted to obtain the proceeds of a life insurance policy he wrote on Alan Foreman. He did this through an elaborate investment scheme where he made it appear that Alan Foreman and others were involved in an investment. An insurance policy issued on Foreman naming one of the investors (Silcox) as beneficiary was part of the business deal. Foreman was not aware that such a policy

[1] The Respondents do not agree with the Petitioner's Statement of Facts. The Respondents, however, will not attempt to correct the Statement of Facts on those points which are not pertinent to the issues before the Court.

had been issued. Indeed, there was in fact no business deal. Martin had attempted to get people he knew to say that they had invested money with him in some business deal. After Foreman's death, Martin would obtain the proceeds of the policy from Silcox, explaining to him it was to pay off the other "investors".

Thereafter Martin approached Richard Lee Earman in hopes of finding a "hit man" for Foreman. (Tr. Nov. 5, 1979, pp. 11-13, 15-20). Martin advised Earman that he was working for someone else. Earman made several unsuccessful attempts to find a "hit man." (Tr. Nov. 5, 1979, 26-30). Earman decided to do the job himself and made several attempts which ended with the murders of Alan W. Foreman and Donna Shoemaker. (Tr. Nov. 5, 1979, pp. 49-94). Earman was tried for his part in the murders but was acquitted.

Earman thereafter turned state's evidence and testified against Martin at his trial. Martin was found guilty after a lengthy trial and was sentenced accordingly.

After the jury was selected, the court instructed the jury not to read any material related to the case. After it was brought to the court's attention during the trial that a political brochure had been mailed to registered voters, the court again advised the jury not to read any such campaign brochures.[2] The trial judge examined the campaign brochure and determined that it was not prejudicial because it did not name the Petitioner or state anything prejudicial to him. (Tr. Nov. 5, 1979, p. 5). The court in its discretion determined not to make inquiry with the jury whether they had read the brochure because there was nothing prejudicial.

The witnesses at trial testified about the material contained in the brochure. William Burroughs testified about

[2] Tr. Oct. 25, 1979, pp. 206-207, 235; Tr. Nov. 2, 1979, p. 68.

his involvement with Martin, the numerous meetings, and his obvious belief that what Martin told him was true. (Tr. Dec. 3, 1979, pp. 20-104). He nolle prossed Martin's cases. Sidney Ploss also testified about Martin's relationship to Burroughs. (Tr. Nov. 29, 1979, pp. 6-7).

Counsel for Martin at trial brought out, through Kaya Ploss on cross-information, information concerning the police investigation of Earman's trial and the Attorney General's investigation. (Tr. Nov. 29, 1979, pp. 96-98). Richard Lee Earman testified that the theory of the Commonwealth's Attorney shifted during the trial of his case and that he (Earman) was allowed to go to the Bahamas after he confessed. (Tr. Nov. 5, 1979, p. 118).

Martin's trial lasted approximately seven weeks, and the transcript consists of several thousand pages. During the trial, jurors asked questions of witnesses and of the court which mostly dealt with clarifications of testimony, temperature of the courtroom, and matters which were obviously not contested. Over the course of the seven-week trial, some thirty-eight questions were asked by the jurors.[3]

---

[3] In the court below, Martin listed the instances of questions as occurring as follows at transcript pages:

Oct. 26, 1979, pp. 12, 56, 60-63, 85, 114, 123, 135, 139;
Oct. 29, 1979, p. 35, 146-147, 171, 174;
Oct. 30, 1979, pp. 28-29, 31-32, 66, 73-74;
Nov. 1, 1979, pp. 12, 83-84;
Nov. 5, 1979, p. 153;
Nov. 8, 1979, p. 448;
Nov. 14, 1979, pp. 66-67, 112;
Nov. 15, 1979, pp. 24, 77-78, 146, 197;
Nov. 19, 1979, pp. 155, 160-161;
Nov. 19, 1979, p. 12, 20-21;
Nov. 20, 1979, pp. 144-145;
Nov. 29, 1979, p. 140;
Dec. 3, 1979, pp. 43, 119-123;
Dec. 3, 1979, pp. 34-44;
Dec. 4, 1979, p. 5;
Dec. 5, 1979, pp. 10-11, 154.

In its Memorandum Opinion the District Court found that "A review of the transcript reveals that these questions, while irrelevant, were, for the most part, innocuous. In no instance did either the question or the answer seriously prejudice the petitioner. Nor can this Court find that the procedure so promoted rapport between the prosecutor and the jury that the Petitioner was denied an impartial trial." (A. 15A.).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

The Petitioner's Claims Are Not Properly Before This Court.

The Petitioner's claims, as originally made in the Virginia Supreme Court, were as follows: "The trial court committed reversible error in allowing random, uncensored questioning by jurors in open court." And, "It was an abuse of the trial court's discretion to deny appellant's motions for a change of venue or continuance, and later for mistrial, prompted by the highly prejudicial publicity and controversy surrounding appellant's trial." In the United States Court of Appeals for the Fourth Circuit, the Petitioner framed his issue as "The appellant's trial was unfair and violated his due process rights because jurors were encouraged to ask random, uncensored questions in open court", and "failure to order a mistrial or at least to examine the jurors concerning a highly prejudicial political mailing sent to them during appellant's trial is reversible error and demonstrates the trial court's blatant disregard for appellant's right to a fair and impartial trial."

It appears that the Petitioner is now complaining that it was a *per se* constitutional violation for the jury to ask spon-

taneous, uncensored questions during a criminal trial,[4] and that it was a *per se* constitutional violation for the court to fail to make inquiry with the jury concerning the political campaign brochure mailed to jurors prior to trial.

It is clear that this Court will not decide federal constitutional issues for the first time on review in certiorari. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969). Neither the state court nor the United States Court of Appeals has decided the issue now presented by the Petitioner. The issues before the Virginia Supreme Court were based on state law. The Virginia Supreme Court has consistently ruled that it will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, and that only errors assigned will be ruled upon. Rule 5:21, *Rules of the Supreme Court of Virginia; Clarendon House* v. *Helfert,* 213 Va. 28, 189 S.E.2d 331 (1972); *Rice* v. *Commonwealth,* 212 Va. 778, 188 S.E.2d 196 (1972); and *Manley* v. *Commonwealth*, 211 Va. 146, 176 S.E.2d 309 (1970).

In *Beck* v. *Washington*, 369 U.S. 541 (1962), the defendant claimed that the Washington statute permitting persons in custody to challenge grand jurors denied equal protection to persons not in custody who were investigated by grand juries. In refusing to rule upon the issue, this Court held that:

> [T]his point is not properly before this court. Although both opinions of the Washington Supreme Court discuss the interpretation of § 10.28.030, neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute.

369 U.S. at 549.

[4] Petitioner's complaint that the questions by the jury allowed the prosecutor to establish rapport with the jury was not raised at trial.

The Virginia Supreme Court has never been called upon to determine the constitutional challenges Petitioner asserts. Nor was the United States Court of Appeals for the Fourth Circuit asked to consider the questions now presented to this Court in the petition for certiorari. Consequently, the issues of constitutional dimensions are not properly before this Court, and this Court should not exercise jurisdiction over such issues when neither the Virginia courts nor the lower federal courts have passed on them. *Illinois* v. *Gates*, 51 U.S.L.W. 4709, 4711 (June 8, 1983).

There is no substantial federal question presented for review to this Court, and the issues do not warrant this Court's attention.

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

Rule 19, *Rules of the Supreme Court of the United States.*

In regard to the issues which have been presented, the Respondents submit that the issues involve procedures which are more properly left to determinations under state law. Indeed, counsel for Petitioner told the state trial court with regard to the jury questions and the *procedures* followed; "I do not think any of the jurors have shouted out a question without first being recognized by the court or Mr. Caruthers [the prosecutor]." (Tr. Dec. 7, 1979, p. 33.) Petitioner's complaint at present concerning the procedure used by the court on jury questions was thereby waived. *Wainwright* v. *Sykes,* 433 U.S. 72 (1977).

II.

The Juror Questions Did Not Prejudice The Petitioner At Trial

The issue of whether a juror should be entitled to ask either counsel or witness a question is a matter which relates solely to state law and does not raise a federal constitutional question. *See, generally, Garner* v. *Louisiana,* 368 U.S. 157, 166 (1961). Under Virginia law, the denial of the petition for a writ of error by the Virginia Supreme Court is a ruling that the method of questioning by the jury was proper under state law. *See Saunders* v. *Reynolds,* 214 Va. 697, 204 S.E.2d 421 (1974).

Martin's complaint that the procedure employed by the court which allowed random jury questions violated his right to a fair trial was preserved by objection at trial; however, he failed to preserve objections to the possible prejudicial effect of any of the individual questions asked. Therefore, the Petitioner has failed to preserve any claims regarding the individual questioning under the doctrine of *Wainwright* v. *Sykes,* 433 U.S. 72 (1977). Indeed, Martin, in his petition for writ of certiorari, has not complained that any of the questions asked by the jurors were prejudicial:

> Petitioner does not contend that his trial was unfair because some questions were virulent rather than innocuous. Rather, he suggests that if a jury in a criminal case is allowed to ask questions of witnesses, counsel and the court, it should neither be as a response to a prosecutor's invitation or done spontaneously, and uncensored and in open court.

Petition for Certiorari, at page 14.

Because no prejudice is alleged and none has been found, this allegation should be denied. Indeed the District Court

found that none of the questions seriously prejudiced the Petitioner, nor did the procedure so promote rapport between the prosecutor and the jury that the Petitioner was denied an impartial trial. *See* App. 15A. of the Petition for Certiorari. The findings by the Virginia Supreme Court by its denial of the petition for writ of error and the District Court's findings of fact should be accepted. The state court denial for a petition for a writ of error should be accepted under the doctrine of *Sumner* v. *Mata*, 449 U.S. 539 (1981), and the District Court's findings should be accepted because they are not clearly erroneous. *See Summers* v. *Watkins Motor Lines*, 323 F.2d 120 (4th Cir. 1963); *United States* v. *Bethea*, 598 F.2d 331 (4th Cir. 1979).

In the court below the Petitioner cited each instance where he felt that the jury questions prejudiced his case. In this Court, however, the Petitioner has alleged no instance of any prejudice as result of any juror questions. Respondents contend that none of the questions asked by any of the jurors in the seven-week trial were in any way prejudicial. Most of the questions dealt with clarifications of a witness' testimony, temperature of the courtroom, and matters which were obviously not contested.[5]

Questions by jurors and the procedure to be employed should be a matter left to the discretion of the state system, and this Court should not attempt to fashion a rule as to the procedure to be employed when a juror has a question. The only time a constitutional issue may be raised is where a defendant has been prejudiced by an improper question. There was no prejudice as result of the questioning by the jurors in this case, and, therefore, this Court should not entertain the Petitioner's claim.

[5] In those few instances where the question could have had an adverse impact on the jury, the court discussed the situation with counsel outside the jury's presence.

There are a few federal cases discussing the issue of questioning by jurors. In *United States* v. *Witt,* 215 F.2d 580 (2d Cir.), *cert. denied,* 348 U.S. 887 (1934), the court held that the procedure of allowing jurors to ask questions of witnesses was discretionary with the court. *See also United States* v. *Gonzales,* 424 F.2d 1055 (9th Cir. 1970).

Whether to allow questions by jurors was discussed in *United States* v. *Callahan,* 588 F.2d 1078, 1086 (5th Cir.), *reh. denied,* 591 F.2d 1343, *cert. denied sub nom., Callahan* v. *United States,* 444 U.S. 826 (1979):

> Callahan claims that the procedure of encouraging jurors to ask questions invades the province of trial counsel and distorts the proper roles of counsel, judge and jury.
>
> There is nothing improper about the practice of allowing occasional questions from jurors to be asked of witnesses. If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development. Trials exist to develop truth. It may sometimes be that counsel are so familar with a case that they fail to see problems that would naturally bother a juror who is presented with the facts for the first time.

The court went on to hold that the procedure employed by the trial court in this case (to require the jurors to put their questions in writing) was not an abuse of discretion. It appears that the federal rule on juror questioning is a matter of discretion with the trial court. The Respondents contend that this Court should not adopt any hard and fast constitutional rule that would require jurors to submit their questions in writing prior to the question being asked. Certainly this Court should not reverse this case when the

Petitioner can point to no questions which were prejudicial to his case.

In the case at bar the trial lasted some seven weeks. In the court below, Martin only alleged a total of thirty-eight instances where jurors asked any questions. Certainly in a complex and lengthy trial, as was the case at bar, these few questions concerning clarifications and matters which did not affect the outcome of the trial, or prejudice Martin, were proper.

There is a detailed review of this issue in 31 A.L.R.3d 872. It appears that most states allow juror questions, and generally the trial court's discretion will not be reversed unless clearly erroneous. Respondents contend that the state court's discretion in this case was exercised properly, and that the District Court's finding was not clearly erroneous. Therefore, this allegation should be rejected.

The cases from the various state courts cited by Martin in his petition are inapposite. Most of the cases do not absolutely forbid juror questions; they only require that the court exercise discretion. Only one case cited by Martin, *Stinson* v. *State,* 260 S.E.2d 407 (Ga. App. 1979), outlaws jury questions. The Respondents contend that the Georgia rule forbidding juror questions may be violative of due process. A defendant may complain he has been denied a fair trial where he is not allowed to ask questions. *See Carter* v. *State,* 234 N.E.2d 650 (Ind. 1968).

A trial court has the duty to see that justice is done. It is proper for the court to allow jury questions in order that they might have a fuller understanding of the case. In that way they may be able to render a verdict that will do justice to the parties.

III.

The Jury Was Impartial

Whether the trial court is required to examine the jury because of media influences which occur during the trial is a matter which is discretionary with the court. The trial court exercised its discretion after it made findings that the brochure was not directly related to the Petitioner's case. The Petitioner was not mentioned in the brochure, nor were any of the circumstances regarding the Petitioner's trial evident. The Respondents contend that the trial judge's findings are fairly supported by the record and should be accepted by this Court. *Sumner* v. *Mata, supra. See also Maggio* v. *Fulford,* 51 U.S.L.W. 3869 (June 6, 1983). Additionally, the District Court's opinion is not clearly erroneous and, therefore, should not be disturbed.

The jury in the Petitioner's trial was selected with little difficulty concerning pre-trial publicity. The record also reveals that the Court had previously instructed the jury prior to the campaign brochure being mailed not to read anything related to the case, and the Court advised the jury after the campaign brochure was mailed not to read any such campaign brochures.

The trial court, in the exercise of judicial discretion, made the correct decision not to question the jurors. The Court was particularly careful, both prior to this incident and thereafter during the seven-week trial, to daily instruct the jury not to read anything related to the case. It is presumed that the jury will follow the court's instructions. *United States* v. *Pomponio,* 517 F.2d 460, 463 (4th Cir.), *cert. denied,* 423 U.S. 1015 (1975).

The trial court made the correct decision not to make inquiry with the jury because the brochure made no mention of Martin, his trial, or anything factually concerning

the murders. Because the brochure was not in and of itself prejudicial, its viewing by a juror would not have deprived Martin of a fair trial.

Other cases where the jury is exposed to news accounts or information which may be deemed prejudicial and the court made no inquiry of the jury have not presumptively deprived a defendant of due process. *See United States* v. *Ricardo,* 619 F.2d 1124, 1132 (5th Cir. 1980); *United States* v. *Grande,* 620 F.2d 1026, 1031 (4th Cir. 1980); *United States* v. *Wenzel,* 311 F.2d 164, 170 (4th Cir. 1962).

United States v. *Taylor,* 569 F.2d 448, 454 (7th Cir.), *cert. denied,* 435 U.S. 952 (1978), cited by the Petitioner, is more supportive of the Respondents' position than his own. In *Taylor,* there were prejudicial news reports about which the court did not make inquiry of the jury. The Seventh Circuit found that it was not plain error. Certainly the information in *Taylor* was more prejudicial to him than the brochure is to Martin in this case.

This Court should deny certiorari on this issue because the alleged material was not prejudicial. Such being the case, the Court need not make inquiry of the jury. *See Thompson* v. *Commonwealth,* 219 Va. 498, 504, 247 S.E.2d 707 (1978); *United States* v. *Hankish,* 502 F.2d 71, 77 (4th Cir. 1974); *Martin* v. *United States,* 528 F.2d 1157, 1158 (4th Cir. 1975).

Because the trial court made the initial determination that the brochure did not rise to the level of substantial prejudice, and the record supports that determination, this Court should not disturb that finding. *Cf. Sumner* v. *Mata, supra.*

Contrary to the Petitioner's assertion that the brochure contained materials which were not admitted at trial, there was nothing contained in the brochure that was not already

known to the jury by the evidence adduced at trial. Therefore, the trial court made the correct decision in not making inquiry of the jury as to whether they had seen the brochure, which contained nothing prejudicial to the Petitioner. Accordingly there is no merit to this complaint.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of September, 1983, 3 copies of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was mailed to Stephen J. Cribari, Esquire; Ronald A. Goodbread, Esquire, CATE & GOODBREAD, P.C., 1776 K. Street, N.W., Suite 900, Washington, D. C. 20006, Counsel for Petitioner.

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